JENOTT MINING CORP.

IBLA 93-646 Decided November 21, 1995

Appeal from a decision of the Area Manager, Tucson, Arizona, Resource Area, Bureau of Land Management, declining to approve application for mineral materials sale. AZA-27592.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Land-Use Planning--Materials Act

BLM may properly decline to approve an application for the small-scale mining and removal of mineral materials from public lands designated part of a desert bighorn sheep management area where BLM is in the process of defining permissible human activity within the area pursuant to its land-use planning authority under sec. 202 of FLPMA.

APPEARANCES: Robert L. Knox, President, Jenott Mining Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The Jenott Mining Corporation (JMC) has appealed from the June 28, 1993, decision of the Tucson, Arizona, Resource Area Office, Bureau of Land Management (BLM), declining to approve its application for a mineral materials sale (AZA-27592).

On February 4, 1993, JMC filed its application, pursuant to the Materials Act of 1947, as amended, 30 U.S.C. §§ 601-604 (1988), and implementing regulations at 43 CFR Group 3600, seeking to purchase up to 100,000 tons of mineral materials each year from Federal lands in sec. 29, T. 11 S., R. 9 E., Gila and Salt River Meridian, Pima County, Arizona. In a mining/reclamation plan dated April 23, 1993 (Plan), JMC specified the NE¼ sec. 29 as the situs of its proposed mining operations, to be called the "Red Rock Mine." 1/ JMC proposed to mine "crushed rocks,

1/ In response to a May 19, 1993, requirement by BLM, JMC submitted another document, entitled "Additional Information for Mining Plan," dated June 7, 1993 (Additional Information).

weathered granite and boulders" year-round, beginning May 15, 1993 (Plan at 1). Mining and related operations were described as follows:

> On the deposit, there is very little top soil, but the top soil that is there will be stockpiled for future reclamation use. * * * Bench mining would be used to remove the rock. The benches will be 10 feet wide by 15 feet high. An air trac drill with a compressor will be used to drill the rock. After completion of enough holes by the air trac, explosives will be used to blast out the rock. Rubber tired front end loaders will be used to move the rock to a crushing and screening plant. The plant will have a primary crusher which uses a jaw to crush 36[-inch] diameter material. A secondary cone crusher will be used to further reduce the rock to a minus 2 material. This material will be sized with the use of a screening plant into saleable products. This saleable material will then be loaded onto dump trucks, with the rubber tired loaders. The trucks will be weighed to assure they are not over weight.

(Plan at 2). JMC stated that its quarry would initially encompass a small area, measuring 250 by 300 feet (1.72 acres), bordered by the north boundary of sec. 29, but that it would later expand to the south in an area 300 by 1,575 feet in the NE¼ of sec. 29. JMC also stated that its crushing/screening plant and related facilities, including a maintenance/fuels storage area, an office trailer, and an explosives magazine would be situated on 2.06 acres adjacent to the quarry to the east. Access to the project area would be provided by constructing a 25-foot-wide, 1,500-foot-long road off an existing county road situated to the north of the minesite in the SE¼ of sec. 20. The total surface area initially disturbed by its operations would be 4.64 acres.

JMC expected "little or no" impact to wildlife from the project, but stated that it would fence the project area should this prove necessary (Plan at 2). Its Plan specified other measures to protect the environment during mining. JMC stated that all surface areas disturbed by the operation would be reclaimed by means of backfilling, grading, and seeding, during and following the end of mining.

BLM declined to approve JMC's application because it deemed a mineral materials sale inconsistent with the management objectives of the Silver Bell Desert Big Horn Sheep Management Area (Management Area), which encompassed the project area (Decision at 2). The decision explains that the Management Area, which was created as a part of BLM's adoption of the December 1988 Phoenix Resource Management Plan (RMP), was designed to "improve habitat condition for desert bighorn sheep." Id. at 1. The decision notes particularly that, by adopting the RMP, BLM had already restricted motorized vehicles to existing roads and trails in the Management Area. Further, the decision indicated that BLM had decided to prepare an "activity plan" for the Management Area, and that this plan

would be influenced by the results of an ongoing study by BLM and the Arizona Game and Fish Department regarding sheep habitat and the impact of human activities on the movement of sheep between crucial habitat areas in the Management Area. BLM therefore concluded that approval of a mineral materials sale would be "premature, prior to completion of the activity plan," but stated that future consideration of such sales would be addressed after completion of the plan (Decision at 1, 2). JMC appealed. 2/

Appellant does not challenge the fact that the land within its proposed project area is situated within the Management Area. Rather, appellant argues that the project area "should be excluded from the * * * Management Area," thus permitting a mineral materials sale (Notice of Appeal at 1). It asserts that exclusion is warranted, as it has no evidence, in the form of sightings or tracks, that bighorn sheep have ever used these lands and as the project lands are not suitable for inclusion in that area, given the use made of surrounding lands. Appellant notes that there is a well-travelled road 1,000 feet to the east across a flat desert floor, a large mine 3-1/2 miles to the west, a landing strip 9 miles to the northeast and another 2 miles to the southeast (and, consequently, many daily overflights), and a natural gas pipeline running across the property. Appellant asserts that, with this level of human activity in the vicinity of the proposed project area, it is "highly unlikely to ever have any bighorn sheep on or crossing the property." Id. Alternatively, appellant argues that its project area "could be included in an activity plan for the area if there is one ever made," thus also permitting a mineral materials sale. Id. at 2.

[1] Section 1 of the Materials Act of 1947 (the Act), as amended, 30 U.S.C. § 601 (1988), authorizes the Secretary of the Interior, "under such rules and regulations as he may prescribe, [to] dispose of materials including * * * stone [and] gravel," including "common varieties of * * * stone [and] gravel" found on public lands, if disposal was not otherwise expressly authorized by law. Regulations implementing the Act appear at 43 CFR Group 3600.

However, the Secretary of the Interior, and BLM (as his designated representative), is required by section 302(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(a) (1988), to manage the public lands "in accordance with the land-use plans developed by him" pursuant to section 202 of FLPMA, 43 U.S.C. § 1712 (1988). See 43 CFR

2/ Appellant's Aug. 16, 1993, letter actually stated that it wished to appeal to the Arizona State Director, BLM. As Departmental regulations provide no right of interim or final appeal to a BLM State Director from a decision regarding an application for a mineral materials sale, BLM properly considered the letter as an appeal to this Board under 43 CFR Part 4.

1610.5-3(a); Animal Protection Institute of America, 117 IBLA 208, 216 (1990). Departmental regulations specifically provide that BLM decisions authorizing the sale or other disposal of mineral materials "shall conform to approved land-use plans." 43 CFR 3601.1-3.

In the present case, there is no dispute that there is an approved plan governing the use of the subject lands, i.e., the Phoenix RMP. See 43 CFR 1601.0-5(k). Also, there is no question that the plan includes those lands in the Management Area or that it precludes motorized vehicular use other than on existing roads and trails in the Management Area.

Appellant proposes both to use motorized vehicles to conduct its operations at the quarry and to construct a road over one-quarter of a mile long to provide access to its proposed project area. It must do so since there is no existing access route to that area, which is 1,000 feet from any existing road. 3/ Appellant would use the road to bring personnel, equipment, and supplies, via motorized vehicles often on a daily basis, to an ongoing mining/processing operation. Use of motorized vehicles is inconsistent with BLM's land-use plan. Thus, absent amendment of the RMP, 4/ appellant is presently barred from gaining such access to the project area. See David R. Hinkson, 131 IBLA 251 (1994) (allowance of desert land entry precluded by land-use plan); Mr. & Mrs. Michael Bosch, 129 IBLA 373, 375 (1994) (sale of lands precluded by land-use plan); Southern Utah Wilderness Alliance, 111 IBLA 207, 210-12 (1989) (authorization of off-road motor vehicle use precluded by land-use plan). This prohibition plainly prevents it from undertaking any of its proposed mining/processing operations at the quarry and adjacent areas.

Approval or denial of an application for a mineral materials sale rests within BLM's discretionary authority. 43 CFR 3610.1-1; Glenn B. Sheldon, 128 IBLA 188, 191 (1994). As the operations proposed by appellant in its application would violate restrictions imposed by the RMP, and as BLM enjoys discretion as to when such applications are to be granted, we conclude that BLM properly rejected appellant's application in this case.

3/ That is evident on the U.S. Geological Survey map ("Silver Bell East, Arizona," Provisional Edition, 1989) provided by appellant with its mining/reclamation plan.

4/ This Board has no authority to amend or otherwise alter the RMP, either to permit the instant mineral materials sale to go forward or for any other purpose. That authority resides with the Arizona State Director, BLM. See 43 CFR 1601.0-4(c), 1610.5-1, and 1610.5-5; Petroleum Association of Wyoming, 133 IBLA 337, 342 (1995); California Association of Four Wheel Drive Clubs, Inc., 108 IBLA 140, 141 (1989); Wilderness Society, 90 IBLA 221, 224 (1986).

Further, the Board lacks authority to review BLM's RMP decisions. Appellate authority over BLM decisions regarding RMP's rests with the Director, BLM, not this Board. 43 CFR 1610.5-2; California Association of Four Wheel Drive Clubs, Inc., 108 IBLA at 141.

We are aware that, in the present case, BLM has yet to fully assess the impact of proposed activities on any desert bighorn sheep that may be found within or in the vicinity of the project area. In the end, it may decide that there will be no impact, or that it can be mitigated (such as by fencing) so that the sale may go forward. See Owen Severance, 118 IBLA 381, 393-94 (1991); High Desert Multiple-Use Coalition, Inc., 116 IBLA 47, 51-53 (1990); James M. Chudnow, 76 IBLA 167, 168-69 (1983), and cases cited therein. However, we conclude that BLM may decline to approve a proposed activity on the public lands while it prepares more detailed activity or other plans governing the use of those lands. See Kenneth Knight, 129 IBLA 182, 184-85 (1994) (rejection of right-of-way application); Chevron U.S.A., Inc., 80 IBLA 324, 331 (1984) (rejection of oil and gas lease offer); R. C. Hoefle, 41 IBLA 174, 176 (1979) (rejection of oil and gas lease offer). Appellant will, of course, have the right to appeal from any subsequent adverse BLM decision implementing the activity plan (once it is developed), either to finally reject its mineral materials sale application or to take other adverse action.

Therefore, we conclude that the Area Manager, in his June 1993 decision, properly declined to approve appellant's application for a mineral materials sale, pending the completion of BLM's activity planning.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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David L. Hughes
Administrative Judge

I concur:

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Gail M. Frazier
Administrative Judge